FILED
AUG 1 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 297

HYMAN-MICHAELS CO., a Corporation, *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Hyman-Michaels Co., respectfully presents this petition for review on writ of certiorari of the decision and judgment of the United States Court of Claims rendered May 1, 1956 in the case of *Hyman-Michaels Co.* v. *United States of America*, No. 49389. The opinion of the Court of Claims is reported at 140 Fed. Supp. 784.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Claims on writ of certiorari is invoked under 28 U.S.C. 1255. The opinion and judgment of the Court of Claims was entered on the 1st day of May, 1956. Petitioner's motion to set aside the judgment was overruled July 12th, 1956. The judgment on which review is sought was rendered after proceedings on remand, ordered by the Court of Claims which granted a new trial, on October 6, 1953, upon petitioner's motion to set aside a judgment entered in favor of defendant on June 2, 1953, reported at 112 Fed. Supp. 229.

STATUTES

The Uniform Sales Act was enacted into law March 17, 1937, 50 Stat. 43, and is now included in Title 28 of the District of Columbia Code, and Section 1112 reads:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. • • • ."

Surplus Disposal Act of 1944, Chap. 479, Public Law 457, 2nd Session, 78th Congress

> "Sec. 33(a) It is the policy of this act to prohibit so far as is feasible and necessary to carry out the objectives of this Act, the importation into the United States of surplus property sold abroad or for export. The Board shall prescribe regulations to carry out such policy, and the importation into the United States is hereby prohibited to the extent specified in such regulations. • • • "

53 Stat. 752, enacted May 22, 1939, amending 43 Stat. 939, became 28 U.S.C. 288(b), provided:

> "(b) In any case in the Court of Claims • • • , it shall be competent for the Supreme Court, upon the

petition of either party, whether Government or claimant, to require by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event the Court of Claims shall include in the papers certified by it, the findings of fact, the conclusions of law and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

* * * *

In such cases the Supreme Court shall have authority to review in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

The foregoing expressly controlled the practice until repealed by the new Judicial Code, effective September 1, 1948. The new Code, 28 U.S. 1255, said merely:

"Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or claimant; * * * "

The revisor's note to that Section said:

"Provisions for authority to review in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make any findings of fact on a material issue, were omitted as unnecessary." H. R. Rep. No. 308, 80th Cong., 1st Sess., A. 107 (1947).

QUESTIONS PRESENTED

Your petitioner respectfully represents that the decision of the Court of Claims raises the following questions:

1. Whether the conclusion arrived at by the Court of Claims, in its opinion, that the language of the export guarantee clause did not mean anything different from what it said, should be reversed, for the court's failure to make any ultimate finding, or sustaining evidentiary or primary findings, on this material issue, in its Findings of Fact.

2. The determination of the Court of Claims, in construing the language of the export guarantee clause as meaning nothing more than a mere assurance of an existing fact, is in conflict with applicable decisions of the Supreme Court, in failing to consider the surrounding circumstances in order to ascertain the sense in which the parties may have used particular terms.

3. Whether, where the Government conceded the contract language in question was intended to guarantee the petitioner, an export permit, for the future when a resale was consummated, the duration of the guaranty was fixed by the occurrence of the event in the future and not necessarily in months or years.

4. Whether there would have been a sale of the barbed wire, if the Government's representative, during the negotiations, had given the guarantee clause, the interpretation which the Government now urges.

5. Whether, the Government as principal is bound to make good on a guaranty, where it is conceded a representative of the Government led petitioner to believe the guaranty clause in question was a future continuing guarantee as to the availability of an export permit, and petitioner executes the contract of sale, relying on such interpretation of the Government's agent.

6. Whether the Government's guarantee, by assuring petitioner of the existence of a fact, upon which the peti-

tioner relied, is intended precisely to relieve petitioner of any duty to ascertain the fact for itself and amounts to a promise to indemnify petitioner if the fact warranted or guaranteed, proves untrue.

SUMMARY STATEMENT

On September 15, 1947, petitioner, an Illinois corporation in the business of reselling surplus at a profit, bought from the Government, a lot of surplus barbed wire approximately 2100 long tons, contained on some 65,000 reels at a price of $120 per ton, located on the English controlled Shaiba Depot, in Iraq (Finding of Fact No. 8). The mimeograph form contract of sale (Pl. Ex. No. 1) (Findings of Fact No. 9) after providing that it be interpreted in accordance with the laws of the District of Columbia, contained the special following condition which was prepared and typewritten in as Article XI by the Government's representatives:

> The Seller guarantees that permission to export the property has been granted by the Iraqi Government.

After payment of $252,000. the petitioner removed the wire from the Shaiba Depot to the Margil wharf, Basrah also in Iraq where it was placed in storage (Finding of Fact No. 11). It was not until July 1948, that petitioner succeeded in finding a purchaser, although it promptly began its attempt to resell the wire immediately after the purchase. Terms were agreed upon with this purchaser and in order to be in a position to consummate this sale petitioner applied to the proper authorities in Iraq for permission to export the wire which permission was refused in September 1948 (Findings of Fact Nos. 12 & 20).

Petitioner advised the Government on October 21, 1948 (Finding of Fact No. 24) that an export permit for the wire had been denied and that this was a breach of petitioner's contract, sufficient for cancellation. At the same

time, petitioner elected to rescind the contract, tendered the return of the wire and demanded the return of its purchase price, plus moving and storage expenses. Thereafter petitioner advised the Government while holding the wire for the Government's account and risk, it would attempt to resell the wire in order to mitigate losses. While contending it had no interest in the wire the Government responded that if petitioner resold the wire, it agreed that fact would be without prejudice to whatever rights the petitioner might be held to have against the Government, except that the resale proceeds should be credited to the Government in the event petitioner was successful in this suit (Finding of Fact No. 26).

In 1951, while this suit was pending petitioner was successful in selling the wire to a purchaser in India and obtaining an export permit from Iraq (Findings of Fact Nos. 27 & 28). The price received was $123,695.02 less than what the petitioner had paid the Government for the wire plus its cost for moving, storage, obtaining permission to export and delivering the wire. Petitioner sues in rescission for that amount under the amended petition filed in the Court below.

The petitioner's claim is based upon the guarantee provision, quoted above, which petitioner contends was intended by the parties at the time the contract was made and the language written, that the Government guaranteed that the Iraqi Government would continue to permit the exportation of the wire until the petitioner would consummate a resale of the same.

The negotiations which led to the contract took place in Cairo, Egypt, in September 1947. At that time the parties to the negotiation knew; that the petitioner was purchasing the wire for resale and did not intend to export before reselling the wire (Findings of Fact Nos. 7 & 30(a)); that the Surplus Property Act of 1944 prohibited the purchaser from importing the wire into the United

States, thus limiting to a considerable extent the field of prospective purchasers (Finding of Fact No. 7(b)); that some time would be required for the plaintiff to resell the wire and export it from Iraq (Finding of Fact No. 30(a)), that it had required some 18 months for the plaintiff to consummate the resale of other surplus property which petitioner had purchased from the Government in Europe (App. "A", Pl. Ex. Nos. 24 & 25) (Finding of Fact No. 7); that the Government was having same difficulty in obtaining permission from the Government of Iraq to export another lot of wire which had been sold to the Government of Southern Rhodesia. The parties also knew that on September 1, 1947, a Special United Nations Committee on Palestine had issued a report containing recommendations for the partition of Palestine; that mass meetings and other demonstrations of protest against this report had occurred in Iraq, Egypt, and elsewhere; that there was unrest in the Arab world over the issue and open talk that armed conflict would result if the recommendations of the Special Committee were carried into effect (Finding of Fact No. 4).

In view of the foregoing facts pertaining to conditions existing at the period of negotiation, which were known to the negotiating parties (Court's Opinion, p. 2), and the possibility that Iraq might prevent the export of the barbed wire in the event of war, petitioner's representative insisted that a guarantee that the wire could be exported be included in the contract (App. "A", Pl. Ex. Nos. 24 and 25) (Finding of Fact No. 7). The Government's representative then had prepared and inserted in the contract Special Condition Article No. XI (Pl. Ex. Nos. 24 and 25, App. "A"):

> The Seller guarantees that permission to export the property has been granted by the Iraqi Government.

While it is conceded in the opinion of the court below, that the matter of being allowed to export the wire was of prime importance to the negotiators, at that time, and in

that place, the decision concludes that petitioner has failed to satisfy the Court that the contract provision which it received at the end of the negotiations was intended to be a guaranty by the Government that the Iraqi Government would continue to permit the exportation of the wire until petitioner would consummate a resale.

Petitioner contends that the Court of Claims in arriving at this conclusion, erred both in fact and in law, just as it erred in the conclusion that on its face, the quoted language was a mere assurance of an existing fact and would leave interested parties to draw their own predictions as to how long this fact would continue to be a fact. Although this is the main issue in the case at bar, there is absolutely no Finding of Fact, ultimate, evidentiary or primary, in the court's Findings of Fact, on or supporting such a conclusion.

As a matter of fact, it is in direct conflict with all of the court's Findings of Fact, pertaining to the export guaranty clause, which are all outlined in Findings of Fact, Nos. 7(a), 7(b), 10, 30(a) and 30(b), which fully support the petitioner's claim that the language was intended to be a guaranty by the Government that the Iraqi Government would continue to permit the exportation of the wire until petitioner would consummate a resale.

REASONS FOR GRANTING THE WRIT

1. Nowhere in the Court's Findings of Fact is there any finding, either factual or circumstantial, on the determination of such material issues set forth in the opinion of the Court of Claims, as, that the language of the export guarantee clause did not mean anything different from what it said and that it was a mere assurance of an existing fact and would leave the interested parties to draw their own predictions as to how long this fact would continue to be a fact.

A judgment of the Court of Claims cannot be sustained in the complete absence of Findings of Fact on such a

material issue as determining that the export guarantee clause was intended in the past tense and did not survive the execution of the Sales Contract.

See *United States* v. *Penn. Mfg. Co.*, 337 U. S. 198, 207, and 211.

Nor are the Findings of Fact aided or rectified by the deficient statements appearing in the conclusions of law or opinion of the court. Findings of Fact on every material issue are a Statutory requirement. 53 Stat. 752, 28 U.S.C. Sec. 288.

See also *United States* v. *Esnault Pelterie*, 299 U.S. 201, 205, and *United States* v. *Causby*, 328 U.S. 256, 267.

As a matter of fact, all the findings of evidentiary fact made by the Court, with respect to the export guaranty clause, are in direct conflict with the Court's conclusions while fully sustaining petitioner's claim that the language meant that the Government guaranteed that the Government of Iraq would continue to permit the exportation of the wire until a resale was consummated.[1]

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[1] FINDINGS OF FACT

7. (a) In the course of the conversations * * * plaintiff's principal representative spoke of his dealings with defendant's Paris office.[3] He also advised defendant's representative that plain-

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[3] Plaintiff's vice-president testified that he told defendant's representative that 15 or 18 months were being consumed in the effort to resell some of the items purchased through the Paris office. Plaintiff now relies on this testimony to establish as the intentions of the parties, in the contract of sale hereinafter described that the defendant's guarantee of an export permit would continue for such time as might be required to resell the wire, and that 15 or 18 months was understood to be a reasonable time for such guarantee to continue. Defendant's representative testified that he would not question the testimony given by plaintiff's vice-president, but that he (defendant's representative) had no recollection of references in the conversation to any specific transaction; that he recalled only his impression of the extent of the knowledge of plaintiff's vice-president of the personnel of the Paris office and of defendant's office procedures generally.

All of the Court's Findings of Fact noted below are couched in terms of the future tense in referring to the use of the export permit at some subsequent time.

Petitioner has not agreed altogether with the foregoing findings as can be seen from its exceptions to the Commis-

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tiff's purpose in buying the barbed wire would be to resell it; and that plaintiff would expect to resell the wire before moving it out of Iraq. He then asked if plaintiff could get an export permit.

(b) Defendant's representative explained to plaintiff's vice-president the difficulties that had been encountered in respect to the issuance of export permits by the Iraq Government and the steps that had been taken to overcome those difficulties. He told plaintiff's vice-president that Iraq had had the refusal of the barbed wire and that defendant was in a position to assure the issuance of an export permit in accordance with the arrangements between the United States and Iraq.

10. That the provision in Article XI whereby defendant guaranteed that permission to export the property had been granted was a provision in standard use by defendant in sales made in countries where defendant knew, from previous experience, that a buyer of surplus property who wanted to export it might have difficulty in doing so without aid from the United States Government in obtaining the export permit. Iraq was such a country.

30. (a) When the contract was negotiated both parties knew that some time would probably elapse before a permit to export the wire from Iraq would be used. Labor conditions and shipping facilities in Iraq were such that the wire probably could not have been removed in a matter of days; and if plaintiff allowed the wire to remain in Iraq until a resale of it had been consummated (as both parties knew plaintiff intended to do), the time that would elapse before export would extend from several weeks to several months.

(b) When the guarantee clause was inserted in Article XI (that permission to export had been granted by Iraq), both parties expected that the Government of Iraq would abide by the commitment it had made with the United States.* * *

sioner's Report and suggested findings filed with the Court of Claims. However these objections in the main, sought no material change. Rather, petitioner requested that the findings be expanded so that there would be no doubt whatsoever as to the meeting of minds on an export guarantee, effective in the future until a resale was consummated, the same conclusion one must reach with the Findings of Fact now before this Court.

So that there will be no question that the proof in the record, fully substantiates these findings, and much more in petitioner's favor, all of the proof in the record pertaining to what was said by all the negotiators, with respect to the export guaranty clause, has been annexed hereto, as Appendix "A".

The evidence outlined in Appendix "A" whether testified to by Mr. Dechert, the Government's representative, or the petitioner's representatives is crystal clear and should satisfy this Court beyond any question of doubt, that the export guaranty clause meant more than it stated, as it was interpreted by the negotiators. Unquestionably, all the parties had a meeting of minds, and intended that the export guaranty which the petitioner received at the end of the negotiations was meant to be a guaranty that the Iraq Government would continue to permit the export of the wire until a resale was consummated and fully substantiates the Findings of Fact quoted above. This is the bargain upon which the plaintiff insisted.

As a matter of fact to use the defendant's representative, Mr. Dechert's own words, the plaintiff made it a condition of the purchase; "a condition of their buying it was * * * they did not want to buy it unless they felt reasonably sure they could export it *after they had sold it.*" (Tr. 103, RDQ. 181, App. "A"). And this Court cannot avoid finding that this is the bargain which the defendant accepted as Mr. Dechert stated, "Yes, I led him to believe he would have an export permit available after resale,"

(Tr. 84, XQ. 100-103, App. "A"); "what I put in the contract was intended to clear his mind in that particular respect," (Tr. 90, XQ. 119, App. "A"); "I exactly intended by the insertion of this clause to cover what Mr. Pennoyer was worried about," (Tr. 94, XQ. 148, App. "A"); and "In view of his purchase of the wire for resale, his intention not to incur the expense of exporting the wire before he had resold it and the possibility that Iraq might prevent the export of the wire in the event of war, when Mr. Pennoyer insisted that a guarantee that the wire could be exported, be included in the contract, I had Mr. Doyle insert the guarantee clause in question." (Pl. Ex. Nos. 24 and 25, App. "A").

On the other hand, there is not a shred of evidence to support the lower Court's opinion that the guarantee was good on the day the contract was executed and not one day thereafter. Although counsel for the defendant had argued that the guarantee clause was intended in the past tense, he submitted no evidence upon which to base such an argument. Why, he never even asked a question along those lines, although he had plenty of opportunity.

Though the Court below was not satisfied with the proof submitted by petitioner as to what was intended by the export guaranty clause, it should have been satisfied by the proof elicited when Commissioner Evans questioned the Government's representative. (App. "A", Tr. 97 and 98, Q 164 and 165, Tr. 104, XQ 185.) In the first opinion of the Court of Claims, rendered June 2, 1953, it also determined that the export guaranty clause should stand as written, in the past tense, directly in conflict with the Commissioner's Findings of Fact that the export guaranty clause was intended as a continuing guaranty in the future.

Of course, the Government's representative, Mr. Dechert, once again testified he intended by the export guaranty clause, a continuing guaranty in the future, not in the

past, thus confirming the Court's own Findings of Fact Nos. 7(a), 7(b), 10, 30(a) and 30(b). In the present record of the case at bar, Commissioner Evans has again reported to the Court of Claims that the export guarantee language was intended as a continuing guarantee in the future.

From all of the foregoing and a reading of the proof outlined in Appendix "A" it is readily apparent why there was no finding of fact, in the determination of such material issues set forth in the opinion of the Court of Claims, as, that the language of the export guarantee clause did not mean anything different from what it said and was a mere assurance of an existing fact. This unfounded conclusion constitutes reversible error in the absence of a finding of fact on such a material issue in this case or the absence of any evidence to sustain such a finding if it had been made.

2. In the light of long settled principles of construing contracts, the Court of Claims should have construed the language of the Government's own export guaranty provision most strongly against it and given effect to the intentions of the parties, so far as they are ascertainable from the surrounding circumstances.

It has been held in the case of *United States* v. *Bethlehem Steel,* reported in 205 U. S. 105 by Mr. Justice Peckham;

> [p. 118] "While it is claimed there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consderation of the correspondence between the partes before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts sur-

rounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. *Simpson* v. *United States*, 199 U. S. 397, 399. In *Brawley* v. *United States*, 96 U. S. 168, 173, the court says: 'Previous and contemperaneous transactions may be all very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms.'

It is not for the purpose of making a contract for the parties, but to understand what contract was actually made that in cases of doubt as to the meaning of the language actually used, prior negoiations may sometimes be referred to."

The circumstances surrounding this transaction and all of the pertinent facts known to the parties already are fully set forth in the Summary Statement, *supra*. None of these circumstances were considered by the Court of Claims in construing the language of the export guarantee. It has failed to place itself in the same situation as both parties, look into the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction and view the terms and intent of the agreement in the same light which the parties did when the guaranty was formulated and accepted.

This well settled rule as to the interpretation of contracts is noted in 46 Am. Jur. 309:

"The cardinal principal in the interpretation of contracts of sale, as in the interpretation of any other contract is to ascertain the intention of the parties and give effect thereto, if it can be collected from the instrument and the circumstances without the violation of some settled legal principal. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view, they are entitled to place themselves in the same situations as the parties who made the contract, so as to view the circumstances as they viewed them and so as to judge of the meaning of the words and of the correct application of the lan-

guage to the things described. Especially where the negotiations are by letter between business men, not conducted in the phraseology of lawyers, or with the care about expression generally used in formal documents, it is not safe and would not be fair to apply technical rules; the proper course is to look at all the circumstances and then read the agreement as one party was bound to consider it understood by the other *Thanobaron* v. *Lewis,* 43 Mich. 635, 5 NW 1082."

See also *Harten* v. *Loffen,* 212 U. S. 397, 404 aff. 29 App. D. C. 490, 503.

Cohen v. *Johnson,* 91 F. Supp. 231.
Miller v. *Miller,* 134 F. 2d 583, 588.

As in the case of any other contract, contracts of sale should be construed so as to sustain, rather than defeat them, if this can reasonably be done. *Simon Bache Co.* v. *Coppez,* 74 N. E. 41, 35 Ind. App. 351; 46 Am. Jur. 308.

In order to give effect to the apparent intention of the parties, the courts have extended this rule of construction by holding they have the power to spell out any necessary implied covenants to effectuate the written provisions of the contract.

See *Nevada Half Moon Mining Co.* v. *Combined Metals,* 176 F. 2d 73, and

New York Casualty v. *Sinclair Refining Co.,* 108 F. 2d 65.

Another recent Second Circuit Court of Appeals case, directly in point is *United States* v. *Lennox Metal Mfg. Co.,* reported in 225 F. 2d 302, where Mr. Justice Frank states:

[p. 309] "Especially because of Walker's testimony concerning the governing uniform practice, the evidence of surrounding circumstances, including the negotiations, became markedly important in determining what the parties meant by the word 'may'

in the Partial Payments clause. For in appropriate circumstances, the word 'may' has often been construed as 'shall'.

* * * We think that, in its context 'may' * * * meaning is 'not so clear as to be self evident,' that it was capable of being understood in more senses than one.'

It bears on the meaning of 'may' in this contract that, if the word is construed as wholly permissive, unreasonable circumstances would ensue: (a) on that interpretation, defendant paid $3,200 for the addition of a clause which would yield defendant nothing * * *. If this interpretation were correct, then the clause 'set a skillful trap' for the unwary defendant, and 'no such purpose should be attributed to the Government. * * * in construing the document the presumption should be indulged that both parties were acting in good faith.' *Sylvan Crest S. & G. Co.* v. *U. S.*, 2 Cir., 150 F. 2d 642, 643. It 'is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own.' *U. S.* v. *Purcell Env. Co.*, 249 U. S. 313, 318, 39 S. Ct. 300, 301, 63 L. Ed. 620."

* * * * * * *

[p. 315] "These rulings deserve particular emphasis when, as here, one of the parties drafted the contract. * * * then the court * * * should adopt the determination, the legal effect of which bears most strongly against the one who chose the words. And where, as here, the Government official in charge has given the other party an interpretation * * * that party may properly rely upon that interpretation."

(b) The latter part of the foregoing opinion follows a long established legal maxim, overlooked by the Court of Claims, holding that if there is any doubt as to the construction of a contractual writing prepared by one party, such doubt is to be resolved against the party preparing the form of the words.

A precedent for this rule is found in *U. S.* v. ***Bentley & Sons Co.,*** 293 F. 229 (D. C. Ohio 1923), where it was held:

> [p. 235] "when the government enters in to a contract with an individual or corporation it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances * * *.
>
> A contract couched in the language of the government's own officers is construed most strongly against it."

A similar situation was construed in the case of *Crowley Co.* v. *Clark Equip. Co.* (2 CCA, Jan. 1920), 263 F. 58, by C. J. Hough as follows:

> [p. 60] "(1) This is the warranty * * * and it is wholly contained in contractual writings prepared by one party; therefore the rule applies that, if there be doubt as to the construction, such doubt is to be resolved against the party preparing the form of the words. *Wilson* v. *Cooper* (C. C. 95 Fed. 628)."

U. S. v. *Newport News Shipbuilding Co.,* 178 F. 194, stated:

> [p. 200] "The rule that a contract is to be construed most strongly against the party preparing it well settled, and applies to the government in a case like this as well as to an individual."

Also in the case of *Merritt* v. *U. S.* 95 Ct. Cl. 421, the Court stated:

> [p. 429] "The contract was drawn by the defendant and in case of doubt must be construed more strongly against it."

See also *Standard Rice Co.* v. *U. S.,* 101 Ct. Cl. 85; affirmed 323 U. S. 106.

In the case of *Drainage Dist. No. 1* v. *Rude,* 21 F. 2d 257, the Court stated:

> [p. 261] " * * * , when a written contract is entirely prepared by one of the parties, and accepted as thus prepared by the other, any doubt as to the meaning of its provisions is to be resolved against the party preparing it."

The same rule is followed where the Court is considering a warranty. In the case of *J. B. Colt Co.* v. *Berry* (Ky. Ct. of App., 1927), reported in 290 S. W. 1059, Dietzman, J., held:

> [p. 106] "The average buyer would interpret the language used in this warranty in no other fashion. It is susceptible of such construction, and as it is the language of appellant (seller), it will be construed most strongly against it and in favor of the buyer."

The constucton given the export guaranty clause by the Court below makes this provision worthless one day after execution of the sales contract. Surely, there must be some doubt that such a bargain was intended, in the light of the prime importance attached to the exportability of the ware, by the negotiators at that time and place. Inasmuch as the Government's representatives prepared the wording of this export guaranty clause, such doubt should be resolved against the Government and the guaranty given some value by construing it to continue effective in the future until a resale was consummated, following the long established precedents set forth above.

c. The legal conception of a guaranty is always understood as an undertaking against some default or event in the future.

A controlling summary of the point is fully outlined in 24 Am. Jur. 878:

"The legal conception of warranty, however, differs from the notion of guaranty. Each is the undertaking by one party to another to indemnify or make good the party assured against some possible default or defect in the contemplation of the parties; *but a guaranty is understood in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default, or event in the future,* whereas the term 'warranty' is generally understood as an absolute undertaking in praesenti as well as in future, against the defect, or for the quantity or quality contemplated by the parties in the subject matter of the contract. Generally the word 'warranty' is applied to a contract as to title, quality or quantity of a thing sold; and *guaranty is held to be the contract by which one person is bound to another for the fulfillment of a promise or engagement of a third person.*" (Emphasis supplied.)

Saranac Automatic Machine Corp. v. *Duke* (5 CCA, November 1933), reported in 67 F. 2d 437, in construing a typewritten clause which "guaranteed" that the machine sold would make blank line samples at the rate of 80 per minute, held:

[p. 437] "Bryan, C. J. (1-4). * * * strictly speaking, there is a difference in meaning between the words 'guaranty' and 'warranty'; *the former is a collateral undertaking against some future default,* where as the latter is an undertaking in praesenti as well as in futuro, against the defect, or for the quantity or quality contemplated by the parties in the subject matter of the contract." 12 R.C.L. 1057. But as these words are frequently used interchangeably, where the undertaking is a warranty, as it is here, it will be construed as such, even though it is referred to by the parties as a guaranty. *Wiley* v. *Inhabitants of Athol,* 150 Mass. 426, 23 N.E. 311, 6 L. R. A. 342." (Emphasis supplied.)

In the light of this legal principle, it is understandable why petitioner's representative accepted the guarantee clause as written. Also, that, the written special condition

was understood to be a collateral undertaking against the future, default of the Iraq Government, is readily discernible by comparing our cluase with the clause used in the Southern Rhodesia contract. (Deft. Ex. No. 2.) There the defendant inserted that, "the seller *agrees* that permission to export has been granted," whereas in our contract the clause reads "the seller *guarantees* that permission to export, has been granted."

Thus, there is no basis in fact or law, upon which to sustain the opinion of the Court below that the guarantee only applied to the situation which existed at the signing of the contract. The defendant in "guaranteeing" exportability, rather than "agreeing" to exportability, clearly entered into a contract of surety, as to the third party engagement of the Iraq Government, that a future export permit, when required after a resale, would be available.

(d) Such a conclusion is also in direct conflict with a provision in the Uniform Sales Act. Inasmuch as the contract provided that it be interpreted under District of Columbia Law, Sect. 1112 of Title 28, District of Columbia Code, should be considered. The Court below has disregarded the Statutory Law which makes any affirmation of fact, or any promise by the seller relating to the goods, upon which purchaser relies, an express warranty, and not just a mere assurance of an existing fact.

3. The duration of a guaranty or warranty may be fixed by the occurrence of an event in the future and not necessarily in terms of years or months.

This settled rule of law is well stated in 17 C. J. S. 877 under Contracts, Sect. 385:

> "Where an agreement stipulates that it is to continue * * * until the happening of a particular event, * * * it remains in force and terminates in accordance with its terms and not sooner."

The guarantee contract entered into by defendant was to remain in effect until petitioner consummated a resale, so that the defendant cannot now urge that eight months (time which expired when embargo was imposed), was sufficient time. The occurrence of a resale was the event which spelled out the duration of defendant's undertaking. Any shorter duration would not allow accomplishment of the purpose for which it was intended, as was so clearly stated in the case of *McKeel* v. *Chesapeake & Ohio Ry. Co.*, 6 CCA, reported in 186 F. 39, Severeus, J.;

> [p. 45] "* * * nor is it necessary that a contract shall definitely fix the period of its duration *even when it is not intended that it shall be of unlimited duration.* It may itself by implication supply the term of its duration. It would in many cases be implied that it was to be terminated when its object had been accomplished and all had been done that was agreed to be done." (Emphasis supplied.)
>
> (Cert. denied 220 U. S. 613)
>
> See also *Scully* v. *Foster Wheeler Corp.*, 178 F. 2d 170.

Mississippi River Logging Company v. *Robsan* (8 CCA, Aug. 1895), 69 F. 773, in a similar situation, supporting plaintiff's contention that the happening of the contemplated event should spell out the duration of the contract, holds that the defendant should remain bound until then:

> [p. 780] "Thayer, C. J. * * * It frequently happens that the full scope and purpose of an agreement cannot be accurately ascertained without considering the subject matter to which it relates and the circumstances under which it was executed. When a case of that kind occurs, and the necessity arises for going outside of the language employed, for the purpose of ascertaining its meaning or the probable intention of the parties thereto, a Court is always privileged to do so, (p. 781) and may properly consider any fact or circumstances which sheds light on the transaction.

> The case at bar is one which in our judgment demands a liberal application of that doctrine. While the parties to the contract have failed to state how long it should continue to remain in force, they have nevertheless manifested an intention to enter into a business arrangement with each other which would last for some years and until a certain expected event, had occurred. We think, therefore, that the happening of that event should be held to limit the duration of contract, and until such time the logging company remains bound by its provisions."
>
> See also *Town of Readsboro* v. *W. R. Co.*, 6 F. 2nd 733 (2 CCA, 1925).

These precedents were followed as late as February, 1954 in the case of *Eagle-Picher Co.* v. *Mid. Cont. Lead & Zinc Co.*, (10 CCA) reported in 209 F. 2d 917.

Other courts have also followed this reasoning. See the case of *Crank* v. *Vogt's Ice Cream Co. Inc.*, a New York Supreme Court Case reported in 15 N. Y. S. 2nd 649.

Another important precedent we must not overlook is the New York Court of Appeals case of *Kernochan* v. *Murray*, reported in 111 N. Y. 306, Andrews, J.;

> [p. 308] "* * * In case of a contract for * * * the sale or purchase of property, *or of a covenant of warranty*, it would be an unreasonable supposition that the parties intended that the obligation should not survive against their representatives, although not specifically named. * * *
>
> * * * They guaranteed that the plaintiff, so long as he held the stock, should receive dividends thereon equal to seven per cent per annum, and that they make good any deficiency. The contract is plain and unambiguous. The obligation of De Mill & Co. was not limited in terms to the duration of the partnership or the lives of the co-partners. The only limitation of time was the period during which the purchaser should hold the stock. The guaranty protected the purchaser while his interest should continue, and this presumably is what he required and what the

parties intended. Any other construction would subject the purchaser to the risk of losing the benefit of the guaranty on the death of the guarantors which might happen at any time."

Our facts are no different, although in the above case stock was purchased, and here barbed wire was purchased. There a guarantee was given that dividends would be available until the stock was resold. Here a guarantee was given that an export permit would be available until the barbed wire was resold. Although in our case, there is testimony as to the time required in a comparable surplus resale, taking 18 months, for the fulfillment of the contract, in neither contract is there a specific date mentioned. However, both contracts do mention a specific event, the occurrence of which clearly spells out the duration of the guarantee. The parties did not intend any shorter period of time. In our case martial law was declared and the Government of Iraq declared an embargo on the export of barbed wire before a resale was negotiated. Inasmuch as the plaintiff did not have the time which it required, defendant must indemnify plaintiff for its inability to export. The interpretation given the guarantee by the Court below would subject the petitioner to the risk of losing the benefit of the guarantee, upon the whim of the Iraq Government in refusing to permit export of the wire which might have happened one or two days after the contract was entered into.

4. There would have been no sale of the barbed wire, if the Government's representatives, during the negotiations, gave the export guarantee clause the interpretation which it now urges.

This point has already been passed upon by the Courts. In the *Mississippi River Logging Co. case, supra,* it was held:

[p. 778] "another point that is argued with some force is that 'the contract, being silent as to its dura-

> tion, was terminable at the pleasure of either party'. It is obvious, we think, from the relations of the parties and the circumstances under which the contract was executed, that if this idea that the contract might be terminated at the pleasure of either party had been suggested to the plaintiff * * * prior to the execution of the agreement, it never would have been executed. * * *."

The leading precedent in the Court of Claims, on this point, is the case of *Hauser* v. *U. S.*, reported in 39 Ct. Cl. 508, where Mr. Justice Weldon stated:

> [p. 524] "* * * The officer acting in behalf of the U. S. acted in good faith, in the matter; he thought the U. S. had a right to remove the building within a certain time, and upon the faith of that belief he assured the public that the purchaser would have sufficient time to remove the same; and for the purpose of giving his principal the benefit of that condition, the announcement was made of the right of removal. If it would have been understood otherwise, no sale probably could have been made. The defendants have profited by the assurance of the right of removal, have failed and refused to defend the title of the (525) claimant, have received the benefit of that assurance, and still retain it to the prejudice of claimant."

It is important to note that Article III of the printed form contract (Pl. Ex. No. 1) (Finding of Fact No. 9) used by the Government in this case made it the obligation of the purchaser to procure an export permit. It has already been conceded that Article XI, the guarantee of exportability, was inserted as a special condition, making it an obligation of the Government when the petitioner specifically sought assurance as to future exportability after a resale, thus superseding Article III. Had the defendant intended to qualify this guarantee, it should have inserted the limitation at the same time. (See Plff. Sug. Finding No. 10(e)). If the defendant had intended to limit the duration of the guarantee, it would have been rather simple to so state.

Its representatives took the trouble to explain to plaintiff and typewrite a provision (Pl. Ex. No. 1) (Finding of Fact No. 9. Art. III) making it the obligation of the purchaser to remove the barbed wire from the Shaiba Depot within 40 days. Why did it not at the same time express some term of months limitation of time for the availability of the export permit? The answer is obvious. There was no such intention. There would have been no sale.

This rule is clearly stated in the case of *American Type Founders* v. *Lanston Monotype Machine Co.*, reported in 45 F. Supp. 531, affirmed 137 F. 2d 728, where Bard, D. J., held:

> [p. 534] "(4) * * * Plaintiff has, however, failed to meet the burden of proof upon it to establish that it was the intention of the parties that the contract be cancellable by either party, on reasonable notice. If such had been the case, it could readily have been expressed in the agreement."

The defendant has offered no proof, either in writing, or in oral statements made at the time of negotiating the contract, that there was any intention to limit the terms of the guarantee. Under the rule stated above, the burden of proof as to such an intention to limit the guarantee rested upon defendant. It has failed to sustain this burden.

Another case in point is *Franklin Tel. Co.* v. *Harrison*, reported in 145 U. S. 459, where Mr. Justice Harlan held:

> [p. 469] "Looking at the written contract which the bill alleges, and the defendant insists was made to carry out the previous agreement, and understanding of the parties—it is quite clear that, although the word 'lease' is used, the parties did not intend that the plaintiff should be subjected, after the expiration of ten years, to the strict conditions applicable to a technical lease of real estate. The contract limits the period during which appellees should be the owners of the wire, but does not limit the time during

> which they could, of right, use it in their business. If it was intended that Harrison Bros. & Co.—having relinquished their valuable contract with the I.L.T. Co., and put up the wire at their own expense—should become, after ten years only tenants from year to year of the Telegraph Company, that intention, it seems to the court, would have been distinctly avowed."

Nor can the petitioner subscribe to the reasoning of the Court below when it holds that no competent agent would make such a bargain for the Government. Such a conclusion cannot be reconciled with the Court's Findings of Fact that the Government had been attempting to sell this surplus wire for over nine months, (See Findings of Fact No. 1); that three or four sales had fallen through during this period because dollars were scarce, (Findings of Fact No. 5); that the disposal office was anxious to get the wire out of the Shaiba Depot because of British insistence, (Tr. 94, 95, App. "A"); and most important of all "• • • because it was clear to the Government itself that it would ordinarily be very difficult and perhaps impossible for the buyer himself to succeed in obtaining an export permit unaided by the United States Government. • • • (App. "A", Pl. Ex. 25.)

In the face of Mr. Dechert's statement, that it was next to impossible for the buyer himself to succeed in obtaining an export permit unaided by the defendant, how can the Court below hold that whether this condition subsequent (lack of an export permit) occurred or not would be completely beyond the control of the Government. The only party who could control this situation, would be the Government, certainly not the petitioner.

By the same reasoning, it is rather plain to see that "the shoe fits on the other foot," and the Court below should have held that no reasonable prudent purchaser such as the petitioner would enter into a purchase of this wire to be resold for profit, unless it was assured

that the United States Government would have an export permit available for use, after resale. It is rather plain to see that no reasonable, prudent purchaser, would have accepted, a guarantee purporting to be a mere assurance of existence of an export permit, in the light of the circumstances existing, at that time, and at that place.

5. Where petitioner executes a written contract of sale, relying on the Goernment's representative's interpretation of a guarantee or warranty contained therein, the Government as principal is bound thereby.

This rule is well established, as outlined in 77 C. J. S. 1154:

> "* * * where, before the contract is entered into, the seller's agent places an interpretation on the warranty contained in the written contract, the seller is bound thereby, where the buyer executed the contract relying thereon."

As recently as last year, this principal was reiterated by Mr. Justice Frank, in the Second Circuit Court of Appeal's case of *United States* v. *Lennox Metal Mfg. Co., supra,* where it was held:

> [p. 314] "* * * The Court will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, if the other knew or had reason to know that he did so. * * * A contractor is bound in accordance with the meaning that he induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act."

In the case of *Harris Bros. Co.* v. *U. S.,* reported in 61 Ct. Cl. 445, where the facts are comparable to the case at bar, Mr. Justice Hay held:

> [p. 463] "* * * the plaintiff did not receive what the government undertook to deliver to it. * * * In such a case it is only honest that the Government should return the money which it received for something what it never delivered to the plaintiff.

> [p. 464] * * * That was a positive statement of the character of the goods which were offered for sale, and the plaintiff had a right to rely on it, for it was so worded as to create and justify the belief that it was intended to enter into the contract which was afterwards made and, in fact, the circulars were made part of the contract afterwards entered into between the parties. It was a representation, which amounts to a warranty, particularly in this case, as the defendant knew and spoke with authority as to the character and condition of the hams, while to the plaintiff their character and condition were unknown. The duty to inspect the hams was not imposed upon the plaintiff. When the statement of the Government left in no doubt the fact stated by it, no inspection by the plaintiff was required.
>
> [p. 465] —The Government lays stress upon what it calls the negligence of the plaintiff in failing to recondition the hams immediately upon their delivery. But we think that the evidence discloses that the plaintiff used due diligence in attempting to have the hams reconditioned."

Thus we have another clear cut precedent to guide the Court in this case. In both cases there is a purchase from the United States Government. In both cases the Government's representatives assured purchaser of an essential fact through a warranty or guarantee, upon which the purchaser relied. In both cases the assured facts proved untrue. *In both cases it was proven and found that the plaintiff did [redacted] proceed with diligence.* Therefore, the plaintiff in the case at bar should recover its purchase price as the purchaser did in the *Harris Bros. Co.* case supra, because "the plaintiff did not receive what the government undertook to deliver to it."

This is also the ruling law in the case of *International Harvester Co.* v. *Harweisen,* 118 N. E. 320, Ind. Appellate Court, Hottel, J:

> [p. 323] "(1-3) * * * In other words there is indefiniteness and uncertainty in the written guaranty in the

respect indicated, and to remove this uncertainty and to apply the warranty to the subject matter entered by the contracting parties, parole evidence is admissible. * * *"

[p. 324] "(4-6) * * * it is shown further by said averments that the interpretation placed on said contract of warranty by said agents was placed thereon by them before appellant executed the notes provided for in said order * * * and that appellee was induced to give his note for and afterwards pay for said tractor, upon the construction thus placed on said warranty by appellant's said agents. Under such circumstances appellant is bound by the construction and interpretation of said warranty adopted by its said agents."

The defendant has conceded that petitioner insisted upon a condition that the defendant have available an export permit in the future after a resale was consummated. The defendant has conceded that it led petitioner to believe that by the guarantee clause the Government intended to meet this condition and assume the obligation to have the export permit available, when required, after resale.

6. A seller's guarantee, by assuring purchaser of the existence of a fact upon which purchaser relies, is intended precisely to relieve purchaser of any duty to ascertain the fact for itself and amounts to a promise to indemnify the purchaser if the fact warranted or guaranteed proves untrue.

The law is well settled with respect to what is meant by a guarantee or warranty, as outlined in 77 C.J.S. 1119, Sales, Sect. 302,

"* * * when the requisition for the existence of a warranty sufficiently exist in a sale contract, the obligation thereby established is that of an undertaking or promise of the seller that the goods are or shall be as represented, or, more specifically, of a contract to indemnify the buyer against loss by reason of the defects therein. Such an agreement is not executed by the execution of the main purpose of the contract, the transfer of the property, but remains as an execu-

tory agreement after the sale is completed. A contract of warranty is not strictly an agreement to pay money or to perform any particular specified act or duty, yet it is a contract for the performance of some act or duty. A contract of warranty may be conditional; and it may be either continuing or limited.

Sect. 303. "* * * if so stipulated, a warranty may cover future defects as well as conditions."

[p. 1172] "Sect. 320. A warranty may by agreement of the parties, be made a continuing one, * * * or the subject matter may be such as to imply its continuance."

This reasoning is followed in the case of *Metropolitan Coal Co.* v. *Howard,* 155 F .(2d) 780:

[p. 784] "Finally, it is apparent that the Coal Company should not be itself charged with lack of care for overloading the barge. A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promise of any duty to ascertain the fact for himself; it amounts to a promise to idemnify the promise for any loss if the fact warranted proves untrue, for obviously the promissor cannot control what is already in the past. Denholm Shipping Co. v. W. E. Hedger Co., supra, 47 F. 2d 213, 214; The Fred Smartley Jr., 4 Cir., 108 F. 2d 603, 606; The Soerstad, D. C., 257 F. 130. To argue that the promisee is responsible for failing independently to confirm it, is utterly to misconceive its office. The Coal Company was therefore quite right in loading the barge as it did; that is precisely what Howard intended that it should do, and now that he is called upon to indemnify his shipper because what he said has turned out to be untrue, he must respond."

A similar contention urged by the defendant was also overruled in the case of *Hallerbach* v. *U. S.,* reported in 233 U.S. 165, where Mr. Justice Day held:

[p. 176] " * * * Obviously this made it much more expensive to do the work than if the representations

inserted by the Government in the specifications of its own preparation had been true and only the character of the material had been found which the specifications unequivocally asserted was there.

A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give effect accordingly, if it can be done consistently with the terms (p. 172) of the instrument. In par. 33 the specifications spoke with certainty of the conditions to be found by claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means, which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which it might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government and that upon it, rather than upon claimants, must fall the loss resulting from such mistaken representations.

See also *Harris Bros. Co.* v. *U. S., supra.*

The petitioner's claim is fully substantiated by the crystal clear reasoning outlined in the three cases cited above. Two of the cases concerned the same defendant as in the case at bar. Just as in this case, all the sellers guaranteed or warrantd a fact to be true, upon which the plaintiff relied, later to find the fact misrepresented.

The Court seems to feel it is a severe penalty for the Government to return the purchase price to petitioner for failure to have an export permit available, after the resale was consummated. This sort of reasoning is contrary to all concepts of the law on guaranty and warranty, while at the same time, it wholly disregards the hardships suffered by the petitioner. Why should the petitioner suffer the loss, when it was the defendant who spoke with such authority as to the availability of the export permit? Why should the petitioner suffer the loss when it was the defendant who was the only one who could obtain

such a permit? And why should the defendant be allowed to keep the monies it obtained through its own mistaken positive representations?

Furthermore, it was at the insistence of the defendant, not petitioner, that the wire was removed from the British Government's Depot as Shaiba. (App. "A", Tr. 68, 94 and 95.) This was not a United States Depot. Naturally there were charges for the storage place at Margil Wharf. But the defendant would never have heard about the cost of removal and storage charges if it had kept its part of the bargain. As a matter of fact these charges did not amount to much at the time of default on the part of the defendant, causing petitioner to rescind. It was thereafter, while the wire was being held for defendants risk and account, some two and one-half years, that most of the charges accrued. These were properly the obligations of the defendant, after tender of return of the wire. Thus, without the permit to export, it can be seen both the moving and the storage was of benefit to the defendant, not petitioner.

Having assumed the obligation for the condition subsequent, the availability of an export permit, it is not unfair to ask the defendant to return the purchase price for failing to fulfill its obligation. Particularly as there would have been no sale in the first place, if the defendant had not made this exact bargain, upon the insistence of the petitioner.

It is eminently unfair to deny to the petitioner the bargain he got, because of the possibility that its fulfillment might take a great deal of time. While there are many arguments, fully set forth in petitioner's brief, in the Court below, as to why the resale of the barbed wire could have taken a great deal of time, the fact of the matter is that it did not take years, a possibility which seems to have affected the Court's decision. Within ten months, the petitioner actually affected a resale (Findings of Fact No.

20). This took place some two months after the Government of Iraq had cancelled all permits for the export of barbed wire. Why should the defendant complain about it taking ten months to effect a resale, when the Government took over nine months (See Findings of Fact No. 1) to sell the barbed wire in the first instance.

And the Court should also restate its opinion with respect to the experience of petitioner's negotiator. The opinion of the Court that this agent of the petitioner, "had recently had great difficulty in arranging for the export of surplus property from a European country," cannot be reconciled with the Court's Finding No. 7, Footnote 3, wherein it is set forth that "he told defendant's representative that 15 to 18 months were being consumed in the effort to resell some of the material purchased through the Paris office."

It was in reselling, not exporting, that the petitioner was having difficulty or rather taking so long in the European deal. That is the exact reason why petitioner's representative stressed the continued availability of an export permit during the time it took to resell and made it a condition of the purchase, that the defendant guarantee the future availability of a permit to export required after a resale was consummated. He knew it would take a great deal of time to resell, just as it was taking in Europe. He had no reason to question the language of the guarantee clause as tendered by Mr. Dechert, particularly in view of Mr. Dechert's assurances, that it was exactly what Mr. Pennoyer required and covered what he was worried about.

A determination of this case by this Honorable Court is necessary in the exercise of its power of supervision of the Court of Claims, which has departed from the accepted and usual course of judicial proceedings in making a determination upon a material issue in the absence of Findings of Fact in support thereof. Furthermore, it is necessary to review the judgment of the Court of Claims,

because Federal questions have been decided in a way in conflict with applicable decisions of this Court and Circuit Courts of Appeals and there is no other Court, with the requisite jurisdiction to resolve these conflicts.

CONCLUSION

For the foregoing reasons, the petitioner contends that the Court of Claims was in error in rendering judgment in favor of the Government and petitioner prays that this Honorable Court issue a Writ of Certiorari so that it can review the action of the Court of Claims.

Washington, D. C., August 1, 1956.

Respectfully submitted,

HYMAN MICHAELS CO.,

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Washington 7, D. C.
Attorney for Petitioner.

Certificate of Counsel

Max Siskind, does hereby certify that he is attorney for Hyman Michael Company, the petitioner named in the foregoing petition for writ of certiorari, that the petition is well founded in law and in fact and not interposed for delay.

Washington, D. C., August 1, 1956.

MAX SISKIND,
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APPENDIX "A"

Evidence in Record Pertaining to Export Guaranty Clause

Government's Representative Mr. Dechert, Direct:

"Tr. 69, 28Q. Do you recall, during these discussions, any mention being made of exportation of this material from Iraq?

A. Yes.

29Q. What is your best recollection of the nature of these discussions?

A. Well, when Mr. Pennoyer said that he might want to buy the barbed wire for his company, he told me that, if they bought it, they would be buying it for resale and, of course, it was most unlikely they would find a buyer in Iraq; and he asked me if he would be able to export the barbed wire from Iraq, without being involved in difficulties with the Iraqi Government. I told him I didn't think there would be any difficulties; * * *"

"Tr. 70, 32Q. Included in that contract is a provision that the seller guarantees that permission to export the property has been granted by the Iraqi Government. How did that clause come to be in the contract?

A. * * * I think, when Mr. Pennoyer asked me if his company would be able to export the barbed wire from Iraq in case they bought it, I told him yes, I described the arrangements made with the Iraqi Government and the procedure for clearing the surpluses; and I told him, because of that, we would be in a position to insert a clause—this clause—in the contract * * *"

"Tr. 71, 35Q. Do you recall any discussion whatever with Mr. Pennoyer or Col. David as to the length of time Hyman Michaels might require to get the material out of Iraq?

A. No, I recall no such discussion. I don't mean there was no such discussion, I just don't recall it."

Mr. Dechert, Cross Examination:

"Tr. 83, 94XQ. That he clearly stated his intention of not exporting the goods until they were resold?

A. I think so yes.

95 XQ. Of course, it was at this time that the question of the guarantee came up?

A. Yes, I think so.

96 XQ. And, in view of the fact that he was worried about being in a position to export after the goods were resold, did you say you would give him some guarantee for that purpose?

A. I don't remember his saying he was worried about exporting. I simply remember, 'If we will be buying, we will be buying for export; will we be able to export?' And, as I recall, I told him yes, we were in a position to assure him he would be able to export it.

97 XQ. You told him you were in a position to assure him he would be able to export it after he resold?

A. I told him I thought we could assure him.

98 XQ. You told him you could or you thought you could?

A. I told him we would insert in his contract a clause guaranteeing that the Iraqi Government had approved the export of the barbed wire.

99 XQ. You just got through telling us he told you about the resale which was to take place in the future; isn't that so?

(Tr. 84) A. Yes.

100 XQ. When he wanted assurance that he could export in the future after a resale, what did you tell him in reply?

A. As I say, I don't recall the exact words; but I think I must have told him—I am sure I must have told him about the arrangements made with the Iraqi Government under which we sold other surplus to others.

101 XQ. Did you lead him to believe he would have an export permit available after resale?

A. Yes.

102 XQ. There is no question about that?

A. No question about whether he would have it or whether I told him?

103 XQ. That you told him.

A. Yes."

"Tr. 89, 116 XQ. * * * Did Mr. Pennoyer ask you or did he not about being able to export after resale?

A. He did.

117 XQ. Did he ask you for some assurance to that effect or that you would guarantee or assure him in that respect?

A. I don't know whether he asked for a guarantee or whether we volunteered the clause in the contract.

118 XQ. In any event, it doesn't matter whether he asked for it or you volunteered it, * * *

A. He wanted to be assured he could export the wire if (Tr. 90) he bought it.

119 XQ. And what you put in the contract was intended to clear his mind in that particular respect?

A. Yes, it was."

"Tr. 91, 130 XQ. Now, in discussing the clause which was inserted as Special Condition XI, was anything said at any time about it having a specific duration of time to be effective, to Mr. Pennoyer?

* * * * * * * * * *

132 XA. No, I don't recall any discussion of the duration of the clause.

"Tr. 92, 133 XQ. Did you say anything that would have led him to believe he had a limitation of time?

A. No, I don't think so.

* * * * * * * * * *

138 XQ. There was nothing put in this guarantee, was there, about its having any time limitations?

* * * * * * * * * *

"Tr. 93, 139 XQ. Nothing put in the contract which would lead Mr. Pennoyer to believe he had to shorten the time or rush his sale to consummation?

A. I looked at the contract hurriedly this morning. I don't think there is anything in the contract.

140 XQ. You never told him orally?

A. No, I don't think it was discussed orally."

"Tr. 94, 145 XA. When I say it was a standard clause, I mean I believe it was inserted in a number of contracts which were negotiated by the office for the sale of goods in Egypt or Iraq when the buyer expressed any concern or wanted some assurance—formal assurance.

146 XQ. I follow you now. It wasn't a standard clause which was mimeographed in every contract, but only when the buyer wanted it?

A. It was not a special condition, so to speak. It was typed in, in the office, under similar conditions to this.

147 XQ. It was only special in the sense that it was not printed in the contract?

A. That's what I mean.

148 XQ. You intended by the insertion of this clause to cover what Mr. Pennoyer was worried about?

A. Exactly.

* * * * * * * * * *

"Tr. 94, 149 XQ. I didn't follow your answers on direct, Mr. Dechert, about how anxious the English were to get the goods out of the Shaiba Depot. Was there—I think 'pressure' was the word Mr. Barnes used, or were they concerned about that?

A. Yes. They had told us they wanted us to get our (Tr. 95) surpluses out of the depot quickly; and I remember that we had—our people both in Iraq and in Cairo were under instructions to sell the stuff and get it moved out as fast as we could. And I think this 40 day clause stems from that.

150 XQ. You did also advise Mr. Pennoyer of that fact?

A. I think so.

151 XQ. At the same time, you didn't tell him anything about exporting out of the country quick, did you?

A. I don't remember telling him anything about exporting out of the country quickly.

152 XQ. As a matter of fact, you never told him to rush it out?

A. I don't remember ever telling him that.

153 XQ. But you did tell him you were anxious to get the goods out of the Shaiba Depot?

A. Yes."

By Commissioner Evans:

"Tr. 97, 164 Q. In the opinion of the Court, the findings and conclusions of which were set aside in the order granting a new trial, the Court indicated that the clause in the contract relating to the permission to export would presumably stand as written meaning that permission has been granted to export stated in the past tense. And that would normally seem to be the end of it. Counsel for the Government has taken that position in the argument of the case. A finding which has been inserted in my report of the facts indicated that there was something in the nature of a continuing guarantee. Now, let's get your understanding of it. Have you at this time a present recollection of whether or not you intended, by inserting this guarantee, to say that permission had been granted, take it or leave it; or did you intend to say, under our arrangements with Iraq, the permission has been granted and will be available at some future time? Can you tell whether you have a present recollection about that?

A. I am not sure I understand your distinction between, 'permission has been granted,' period, and 'permission has been granted and will be available'.

"(Tr. 98 165Q. All right. Do you have a present recollection—has your memory been refreshed sufficiently—about what you did when you put in this clause at the time?

A. Yes, I think so, Mr. Commissioner.

166 Q. Now, in inserting this clause, would it be accurate to say it was your understanding and intention to say to Hyman-Michaels Co. that 'we have made arrangements with Iraq whereby that country has given permission to

export and, if you buy this property now, you can take it right out; or did you intend to go a step further and say that 'we have made arrangements whereby permission has been granted and you may take the property out assuming it will take a few weeks or a few months to get it out'?

A. The latter."

("Tr. 104, 185 XQ. In answer to a question of the Commissioner—I think the question was sort of hypothetical, based on a few weeks or a few months,—in order to clear the record, there was no such talk of a few weeks or a few months; is that correct?

A. I don't recall any discussion of a likely time in which the goods would be exported.")

Mr. Dechert Re-direct:

"Tr. 103, 181 RDQ. Mr. Dechert, during their negotiations with you, were Mr. Pennoyer and Col. David particularly interested in securing this barbed wire for Hyman-Michaels, or was their particular interest in securing same guarantees with respect to exportation from Iraq?

A. * * * I got the impression that their primary concern was to buy the barbed wire, but that a condition of their buying it was * * * they didn't want to buy it unless they felt reasonably sure they could export it after they had sold it."

"Tr. 103, 182 RDQ. And I think you said on several occasions that you have no recollection of any discussion with respect to duration of this export permission?

A. That's right; I have no recollection of any such discussion.

Plaintiff's negotiator, Mr. Pennoyer, further testified as to what the parties intended, by the guarantee clause, in his deposition, Pl. Ex. No. 26, as follows:

"P. 13, Q. Then what did you intend the guarantee to cover—would it be an indefinite time?

A. Yes, sir. Particularly, as we were buying it from our Government."

"P. 14, Q. Mr. Mullender: That you said that you expected and intended a continuing guarantee in the future and, did you intend those words that the permit has been obtained to include a future guarantee?

A. Yes, sir.

Q. You intended those words to include that term?

A. Yes."

"P. 19, Q. Now, Mr. Mullender has referred to this special guarantee clause and whether you felt it was a guarantee (p. 20) in the past or the future; wasn't it a fact that you just depended on the United States Government guaranteeing that you would have an export permit when you needed it, and that's why you accepted that particular guarantee clause?

A. Yes, sir; it was."

Col. David, present at the conferences, also confirmed the fact that the clause was intended to cover a future resale and would be effective until such an eventuality, as follows:

"Tr. 21, 13 Q. Now, during the talks with respect to the business Hyman-Michaels was in, was there anything said about any (Tr. 22) particular purpose this barbed wire was to be purchased for?

A. The purpose for which it was bought was for resale at a profit. For that purpose it would be necessary to ship the material to a destination overseas, excluding the United States. It was not intended to ship the material—(continued at 15A) until it was sold—before it was sold. The cost of shipping it would be heavy, because it might be sent out of the country, and then the eventual sale might be to a place at the far end of the earth. For the purpose of this shipment, it was necessary that the permission to export should be available at the eventual time of shipment.

"Tr. 23, 16 Q. This was all explained to Mr. Dechert, was it?

A. I wouldn't like to testify it was in these words; but, to the best of my recollection, this sense was put over.

17 Q. At least it was the substance of the conversation?

A. Yes, sir, that is my recollection.

18 Q. Now, did Mr. Dechert make any reply or object to—

A. Mr. Dechert to the best of my recollection, was immediately able to assure us that permission to export would be granted.

19 Q. For that particular purpose that we have just discussed?

A. For the purpose of resale at a profit and for shipment to an overseas destination."

"Tr. 25, 29 Q. What did Mr. Dechert say about the request of Mr. Pennoyer for a guarantee as to the export permission?

A. To the best of my recollection, that he would be able to give such a guarantee.

30 Q. Now, in Mr. Dechert's talk about the guarantee, was anything said by Mr. Dechert about this guarantee being good for a reasonable time?

A. To the best of my recollection, there was no mention of the period for which the guarantee should be effective."

(Plaintiff's Exhibit #24)

IN THE UNITED STATES COURT OF CLAIMS

No. 49389

HYMAN-MICHAELS CO., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

STATEMENT OF RODNEY PENNOYER

I, Rodney Pennoyer, Vice President, Hyman-Michaels Company of Chicago, Illinois, negotiated, in September,

1947, a contract with Cornell W. Dechert, representing the Office of Foreign Liquidation Commissioner, for the purpose of approximately 2,100 tons of barbed wire located in Iraq.

These negotiations took place in Cairo, Egypt. During the negotiations there was a demonstration in Cairo, against the proposed partition of Palestine and feeling was very strong against all non-Mohammedans. Because of this tense international situation, the possibility of war between Palestine and the Arabian countries was a subject of everyday discussion.

I discussed with Mr. Dechert the fact that Hyman-Michaels Company was purchasing the barbed wire for resale and that Heyman-Michaels or purchasers from it were prohibited by the Surplus Property Act from importing the barbed wire into the United States. I knew from experience, and I explained to Mr. Dechert, that it would take some time for Hyman-Michaels to resell and deliver the barbed wire in view of the large quantity involved and the remote location of the material. Mr. Dechert knew personally that it had taken Hyman-Michaels about a year and a half to resell and export surplus property it had purchased in Europe.

I also advised Mr. Dechert that Hyman-Michaels did not intend to incur the expense of exporting the barbed wire from Iraq before it had resold it.

Mr. Dechert, during the negotiations, informed me that difficulty was being experienced in getting 2,000 tons of barbed wire out of Iraq which had been sold to the Government of North Rhodesia.

In view of the above-mentioned conditions which existed during the period of negotiations and were known by me and Mr. Dechert, the exchange of information between us, and the possibility that Iraq might prevent the export of the barbed wire in the event of war, I insisted that a

guarantee that the wire could be exported be included in the contract. Mr. Dechert then instructed his assistant, Herbert J. Doyle, to insert a guarantee in the sales agreement, and Mr. Doyle composed a guarantee and typed it into the sales agreement.

(Signed) RODNEY PENNOYER
November 9, 1951

(Plaintiff's Exhibit #25)

AHB:KMB
154-49389 (C. Cls.) bbf

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON 25, D. C.

Mar. 19, 1952

Max Siskind, Esquire
1029 Vermont Avenue, N. W.
Washington 5, D. C.

Re: Hyman-Michaels Co. v. United States, Court of Claims No. 49389

Dear Mr. Siskind:

Pursuant to the arrangements we made at the pre-trial conference, we submitted Mr. Pennoyer's statement to Mr. Cornell Dechert, who is presently employed by the Mutual Security Agency in Paris. We have just received a letter from Mr. Dechert commenting on this, and expressing his recollection of the events. Eliminating the opening and closing paragraphs, which are not germane to this matter, Mr. Dechert's letter reads as follows:

> Mr. Pennoyer's statement corresponds closely with my recollection of the events in question. There are, however, several points on which his recollection is faulty, which I will indicate. I did not know personally that it had taken Hyman-Michaels about a year and a half to resell and export the surplus prop-

erty it had purchased in Europe. Mr. Pennoyer himself was the source of the only information I had concerning his dealings with our Paris office. Mr. Pennoyer refers to a sale of barbed wire to the Government of Northern Rhodesia whereas I believe the sale was to the Government of Southern Rhodesia. Finally, I do not think that Mr. Doyle composed the export guarantee clause, which was rather, as you suggested, standardized terminology inserted where such a provision was indicated.

It may be useful to you for me to attempt to recall our intention in guaranteeing that permission to export had been obtained. In such transactions, when the buyer indicated at the time of purchase that he would export the property, we generally stood ready to insert such a guarantee in the contract, if in fact, we had obtained the consent of the government in whose territory the property was located for its exportation. For some countries, for example, if I remember correctly, Egypt, we had a general understanding with the Government which made it possible to insert the guarantee without negotiating specific cases. I seem to recall, however, that we had no such understanding with the Iraqi Government, or if we did, one that in practice proved not very dependable. In any case, I was obliged to go to Bagdad several times to assist in negotiations of our diplomatic mission and the local OFLC representative, Lt. Col. Arthur R. MacLean, and the Iraqi authorities, concerning the exportation of surplus property. Under the arrangements worked out with the Iraqi Government, we were obliged to obtain specific consent to the exportation of certain types of goods, and did, in fact, obtain their consent to the exportation of the barbed wire. We undertook to obtain consent to export on behalf of the buyer in such cases because it was clear to us that it would ordinarily be very difficult and perhaps impossible for the buyer himself to succeed in obtaining an export permit unaided by the United States Government. We did not, of course, intend by the guarantee to protect the buyer indefinitely against the possibility that the foreign government might forbid export; in other words, we expected the buyer to

export the goods within a reasonable time. In view of the shortage of shipping, a reasonable time may well have been the period from the purchase of the wire by Mr. Pennoyer's company to May 1948 when you say, Iraq proclaimed martial law and prohibited the export. I cannot vouch for that, however, and you may wish to adduce evidence thereon.

We could, of course, prepare a formal statement similar to the one which Mr. Pennoyer signed, and return it to Mr. Dechert for signature. This will delay the final disposition of this matter further, and the possibility has occurred to us that you might be willing to accept the foregoing in lieu of a more formal statement. We shall, of course, be glad to let you compare this with Mr. Dechert's original letter, if you so desire.

Will you please let me know what your preferences are in this connection?

Sincerely yours,

(Signed) HOLMES BALDRIDGE
Assistant Attorney General

CC: Honorable W. Ney Evans
Commissioner
United States Court of Claims
Washington 6, D. C.

APPENDIX "B"

In the United States Court of Claims

No. 49389

(Decided May 1, 1956)

HYMAN-MICHAELS COMPANY, A CORPORATION,
v. THE UNITED STATES

Mr. Max Siskind for plaintiff.

Mr. Kendall M. Barnes, with whom was *Mr. Acting Assistant Attorney General Geo. S. Leonard*, for defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

On September 15, 1947, the Government sold to the plaintiff a quantity of barbed wire estimated at 2,100 long tons, at a price of $120 per ton. The wire was located at Shaiba Depot, in Iraq. The written contract of sale contained the following provision:

> The Seller guarantees that permission to export the property has been granted by the Iraqi Government.

The plaintiff paid the Government $252,000 for the wire, and removed it from the Shaiba Depot to Basrah, Iraq, where it was placed in storage. The plaintff promptly began to attempt to resell the wire to a foreign purchaser, but did not succeed in finding one until September 1948. At that time it agreed upon terms of sale with a purchaser, subject to inspection by the purchaser, the seller to guarantee shipment within 60 days after the purchaser established credit. In order to be in a position to make this sale, the plaintiff applied to the proper authorities in Iraq for permission to export the wire. That permission was refused.

On October 21, 1948 the plaintiff advised the Government that it had been definitely denied the right to export the

wire; that this was a breach of the plaintiff's contract with the Government, which breach canceled the contract. The plaintiff demanded from the Government the return of the purchase price, plus the plaintiff's moving and storage expenses. Such a claim was filed with the Comptroller General of the United States who, on June 22, 1949, denied it. The plaintiff advised the Government that it was attempting to resell the wire in order to mitigate damages. The Government responded that it had no interest in the wire, but agreed that if the plaintiff resold it, that fact would be without prejudice to whatever rights the plaintiff might be held to have against the Government, except that the resale price should be credited to the Government in case the plaintiff recovered in a suit on the contract.

The plaintiff in 1950 obtained an export permit from Iraq and in 1951 sold the wire to a purchaser in India. The price received was $123,695.02 less than what the plaintiff had paid the Government for the wire plus its costs for moving, storing, obtaining permission to export, and delivering the wire. The plaintiff sues for that amount.

The plaintiff's claim is based upon an interpretation of the language quoted above, which appeared in its purchase contract, which would in effect make that language mean that the Government guaranteed that the Iraqi Government would continue to permit the exportation of the wire for whatever time it might take the plaintiff to make a satisfactory resale of the wire. It says that this was the intention of the parties at the time the contract was made and the language was written.

The negotiations which led to the contract took place in Cairo, Egypt, in September 1947. At that time the parties to the negotiation knew that the plaintiff wanted to purchase the wire for resale and hoped to resell it before exporting it; that the Surplus Property Act of 1944 prohibited the purchaser from importing the wire into the United States; that some time would be required for the plaintiff to resell the wire and export it from Iraq; that it had required some 18 months for the plaintiff to consummate the resale and export of some surplus property which the plaintiff had purchased from the Government in Europe; that the Government was having some difficulty in obtaining permission from the

Government of Iraq to export another lot of barbed wire which had been sold to the Government of Southern Rhodesia. The parties also knew that on September 1, 1947, a Special Committee on Palestine of the United Nations had issued a report containing recommendations for the partition of Palestine; that mass meetings and other demonstrations of protest against this report had occurred in Iraq, Egypt, and elsewhere; that there was unrest in the Arab world over the issue and open talk that armed conflict would result if the recommendations of the Special Committee were carried into effect.

The negotiations were carried on with the foregoing facts in the minds of the parties. The language already quoted,

> The Seller guarantees that permission to export the property has been granted by the Iraqi Government.

was inserted in the contract, as it was in all such contracts made during that period in countries where the Government knew, from previous experience, that a buyer of surplus property might have difficulty in exporting it without aid from our Government in obtaining an export permit.

On its face, the quoted language is a mere assurance of an existing fact, and would leave interested parties to draw their own conclusions and make their own predictions as to how long this fact would continue to be a fact. It is difficult to see how an experienced person such as the plaintiff's vice-president, who conducted the negotiation for the plaintiff, and who had recently had great difficulty in arranging for the export of surplus property from a European country, could have read into the contract language more than it said. But the plaintiff has insisted strenuously that the contract language, in the circumstances, was intended by the parties to embody a condition subsequent, entitling the buyer to rescind the contract and be placed in *statu quo ante* if, at any time in the future, the plaintiff desired to export the property and was not permitted to do so.

Because of this insistence we directed a second hearing of the case to permit the plaintiff to prove, if it could, that in spite of the words of the contract, its meaning to the parties was that which the plaintiff urged that it was. The evidence taken in the second hearing does not satisfy us that the lan-

guage meant anything substantially different from what it said.

The plaintiff points to the answer given by Mr. Dechert, the Government's negotiator in the transaction, when he was asked whether the plaintiff's negotiators were particularly interested in securing some guarantees with respect to exportation from Iraq. The answer was:

> I got the impression that their primary concern was to buy the barbed wire, but a condition of their buying it was their ability—they did not want to buy it unless they felt reasonably sure they could export it after they had sold it.

This answer confirms the fact, which really required no confirmation, because it would necessarily have been in the minds of intelligent and informed negotiators at that time and in that place, that the matter of being allowed to export the wire was of prime importance. But it does not prove that the contract provision which they got, at the end of the negotiation, was meant to be a guaranty that they would still be able to export the wire whenever they desired to do so.

The sale was a cash sale, with immediate delivery to the purchaser, who caused the property to be removed from the Government's Shaiba Depot to a storage place hired by the plaintiff at Margil Wharf in Basrah, Iraq. The moving cost the plaintiff $7,176.17. Storage charges began immediately to accrue. Yet the plaintiff says the Government would not know, perhaps for years, whether the wire had been sold at all, or not. If the condition subsequent, lack of an export permit, should occur, the Government would find that the money it received for the wire would have to be refunded, it would have to pay for the moving, which was of no benefit to it, and the storage, which was apparently of no benefit to it. And whether this condition subsequent occurred or not would be completely beyond the control of the Government. No reasonably prudent individual would make such a bargain for himself, and no competent Government agent would make such a bargain for the Government. A court should not saddle a Government agent with the responsibility for having made such a bargain for the Government, when the contract which he prepared and signed does not express such a bargain, and the evidence is insuffi-

cient to persuade the court that such a bargain was intended.

The plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

1. During the first nine months of 1947 defendant (acting through the Central Field Commissioner for the Africa Middle East, Persian Gulf Command Area, Office of the Foreign Liquidation Commissioner, Department of State) had in Iraq various items of property for sale under the Surplus Property Act of 1944. Among the items was a quantity of barbed wire estimated at approximately 4,000 tons.

2. At all times material to this action the Government of Iraq was a sovereign power, duly constituted and having authority to forbid the exportation of property from its territorial limits.

3. During the spring and summer of 1947 defendant sold most of the surplus property it had in Iraq. Some of the purchasers wanted to export the items they had bought. Permission for such export had to be obtained from the Government of Iraq. In the course of these transactions prior to July 1947, defendant found it necessary to obtain, or to assist the purchasers in obtaining, the permission of the Iraqi Government to export the items so sold.

In July 1947, following conversations on the highest diplomatic level in Iraq, an understanding was reached between the Government of that country and representatives of the United States whereby the Government of Iraq agreed that surplus property sold by defendant from its stock in Iraq could be exported from that country if certain conditions had been fulfilled. The conditions were that the items should first be offered to Iraq, for purchase by the Government or by a citizen of that country; and, if Iraq did not agree to purchase or provide a purchaser within a limited, stated time (indicated as being two weeks or less),

then defendant's bill of sale to another purchaser would be honored for an export permit.

4. On September 1, 1947, a Special Committee on Palestine of the United Nations issued a report containing recommendations for the partition of Palestine. Mass meetings and other demonstrations of protest against this report occurred in Iraq, Egypt, and elsewhere, in the early part of September 1947. There was unrest in the Arab world over the issue, and open talk that armed conflict would result from implementation of the committee recommendations.[1] These facts were known to the representatives of plaintiff and defendant who later negotiated the contract in suit.

5. After the understanding described in finding 3 had been reached, defendant negotiated sales of the barbed wire, which was stored at Shaiba Depot. One sale, for approximately half of the wire, was negotiated with the Government of Southern Rhodesia. The agreement of sale was executed in September 1947, and the sale to Southern Rhodesia was consummated. Defendant negotiated three or four sales of the remaining half of the wire, but none of the purchasers was able to obtain sufficient dollars, and all of the sales fell through.

6. (a) In September 1947, two representatives of plaintiff (an Illinois corporation engaged in buying and reselling surplus commodities) called on defendant's representative in Cairo, Egypt, for the purpose of ascertaining what surplus property, if any, was available through that office. At that time the Cairo office had disposed of most of the surplus items in its charge, and preparations were being made for closing the office. While plaintiff's representatives were in conversation with defendant's representative in the latter's office, a telephone conversation took place in the course of which defendant's representative mentioned barbed wire. Plaintiff's representatives followed up the reference by expressing interest in the wire, if any was available for purchase by plaintiff.

[1] The animus of the Arabs was at this time directed largely toward the British (and, as always, toward the Israelis). No official announcement of position regarding the partition issue was made by the United States until October 1947, after the contract in suit had been made.

(b) Defendant's representative explained to plaintiff's representatives the situation in relation to the barbed wire: that it had been sold, in two parts; that the sale of one part (to Southern Rhodesia) was virtually certain; that there was some uncertainty about completing the sale of the other part, because of the would-be buyer's inability to obtain dollars. Defendant's representative then asked if plaintiff could deposit ten percent of the purchase price, if it should develop that some of the wire was available. Plaintiff's representatives replied that they would pay the whole price in dollars and at once.

7. (a) In the course of the conversations (which were held intermittently over four or five days) plaintiff's principal representative (a vice-president of the corporation) [2] spoke of his dealings with defendant's Paris office.[3] He also advised defendant's representative that plaintiff's purpose in buying the barbed wire would be to resell it; and that plaintiff would expect to resell the wire before moving it out of Iraq. He then asked if plaintiff could get an export permit.

(b) Defendant's representative explained to plaintiff's vice-president the difficulties that had been encountered in respect to the issuance of export permits by the Iraqi Government and the steps that had been taken to overcome those difficulties. He told plaintiff's vice-president that Iraq had had the refusal of the barbed wire, and that defendant was in a position to assure the issuance of an export permit in accordance with the arrangement between the United States and Iraq.[4]

---

[2] References hereinafter to plaintiff's vice-president are to the same individual.

[3] Plaintiff's vice-president testified that he told defendant's representative that 15 or 18 months were being consumed in the effort to resell some of the items purchased through the Paris office. Plaintiff now relies on this testimony to establish as the intention of the parties, in the contract of sale hereinafter described, that defendant's guarantee of an export permit would continue for such time as might be required to resell the wire, and that 15 or 18 months was understood to be a reasonable time for such guarantee to continue.

Defendant's representative testified that he would not question the testimony given by plaintiff's vice-president, but that he (defendant's representative) had no recollection of references in the conversations to any specific transaction; that he recalled only his impression of the extent of the knowledge of plaintiff's vice-president of the personnel of the Paris office and of defendant's office procedures generally.

[4] Both parties knew that the Surplus Property Act of 1944 prohibited importation of the wire into the United States.

8. On September 15, 1947, plaintiff and defendant entered into a contract whereby defendant, acting pursuant to the Surplus Property Act of 1944, sold to plaintiff the quantity of barbed wire remaining unsold as described in finding 5. The quantity was estimated to be 2,100 long tons, and the sale price was $120 per ton. A copy of the contract is in evidence as plaintiff's Exhibit No. 1, and is incorporated herein by reference.

9. The contract, which was prepared by defendant, contained the following provisions:

> Article One. *Warranty.*—The Seller agrees to * * * sell to the Buyer "as is, where is" and without warranty except as to title, and subject to the conditions hereinafter set forth, and the Buyer agrees to * * * purchase from the Seller, certain movable property * * *.
>
> Article Two. *Title.*—Title to the property hereby sold shall pass to the Buyer upon the execution and delivery of this contract.
>
> Article Three. *Delivery and Removal.*—Delivery and removal of the property hereby sold shall take place at its present location within 40 days after payment has been made in accordance with the provisions of Article Four hereof and upon proper proof that customs duties and taxes, if any, have been paid in accordance with Article Six hereof, or that proof satisfactory to the Seller has been produced that the Buyer has obtained the permission of the Government in interest to export the aforesaid property. In the event of failure on the part of the Buyer to remove the property hereby sold within the time specified herein or any extension thereof, the Seller, after ten days written notice to the Buyer, may dispose of the property as it sees fit (including destruction or abandonment) and the Buyer shall be liable for any expenses incident thereto.
>
> Article Five. *Transportation.*—The Buyer will furnish and pay for all transportation necessary for the removal of the property hereby sold.
>
> Article Eight. *Applicable Law.*—This contract shall be interpreted in accordance with the laws of the United States of America, as the same exist in the District of Columbia.
>
> Article Eleven. *Special Conditions.*—Quantities of the items listed * * * are approximate only. Any variation between the quantities stated * * * and the quantity actually delivered * * * , will be adjusted at * * * unit cost * * *.

> The Seller guarantees that permission to export the property * * * has been granted by the Iraqi Government.

The text of Article Eleven had been prepared by defendant and was typed into the printed form.

10. The provision in Article 11 whereby defendant guaranteed that permission to export the property had been granted was a provision in standard use by defendant in sales made in countries where defendant knew, from previous experience, that a buyer of surplus property who wanted to export it might have difficulty in doing so without aid from the United States Government in obtaining the export permit. Iraq was such a country. Egypt was another.

11. Plaintiff duly paid for the wire, accepted delivery and removed it from the Shaiba Depot to storage at Margil Wharf in Basrah, Iraq. The fair and reasonable cost of moving the wire to storage, which was paid by plaintiff, was $7,176.17.

12. Plaintiff promptly commenced negotiations for the sale of the wire in South America. Negotiations which looked promising in October 1947 failed within a few weeks when the prospective buyer was unable to establish credit satisfactory to plaintiff.

13. On February 27, 1948, plaintiff wrote defendant that the amount of wire actually delivered was 1,616.85 long tons instead of 2,100 long tons and asked for a refund.

14. On May 14, 1948, the Government of Iraq proclaimed martial law. This was an act of sovereignty.

15. On May 24, 1948, defendant replied to plaintiff's request for a refund, stating (in part):

> * * * It has been determined, due to short deliveries, that you are entitled to a refund of $57,978.
>
> Since the above determination has been made, this office has adopted a policy that the beneficiary of all refunds must first execute a release form, such as is attached hereto.[5] It is, therefore, requested that an appropriate official of your company execute the form in duplicate. As soon as we are in receipt of this form the necessary action will be taken to effectuate the refund.

[5] It is not established by the evidence that the policy so adopted, or the release form submitted to and subsequently executed by plaintiff, bore any relation to the action of the Iraqi Government in proclaiming martial law or in subsequently forbidding the export of military items.

16. On May 25, 1948, the Iraqi military authorities prohibited the sale, transfer, or export of a variety of military items, including barbed wire, except with the authorization of the Ministry of Defense. This was an act of sovereignty. Thereafter, plaintiff's agent duly registered the wire with the military authorities in Iraq, in conformity with the requirements of the Iraqi Government.

17. On June 1, 1948, a duly authorized representative of plaintiff executed and forwarded to defendant the following release:[6]

> I * * * for and in consideration of a refund under Contract * * * dated 15 September 1947, in the sum of $57,978 * * * to me paid or to be paid * * * for and in behalf of the United States * * * release and forever discharge the * * * United States, of and from all manner of cause or causes of action, claims, or demands growing out of said Contract. * * *

This was the release form enclosed in defendant's letter of May 24, 1948, quoted in finding 15 above.[7]

18. Plaintiff had paid to defendant, on account of the estimated 2,100 long tons of wire, the sum of $252,000. After the release described in the preceding finding was received by defendant, a refund was made to plaintiff of $57,978. Plaintiff was thereafter in the position of having paid $194,022 for 1,616.85 long tons of wire.

19. (a) By letter dated July 10, 1948, plaintiff's vice-president informed defendant of the advice received from plaintiff's agent in a letter dated June 29, 1948, concerning the declaration of martial law in Iraq, the necessity for registering the wire, and the restrictions imposed upon its export, and further stated that:

> We are quite disturbed by this due to the fact that we are now negotiating a sale for at least a portion, and possibly the entire parcel, to a European customer who has not as yet given us detailed shipping instructions, but these are expected by cable during the coming week. We would like for you to advise us whether any

[6] In executing this release, plaintiff was not advertent to possible claims growing out of action by the Government of Iraq in forbidding the export of military items.

[7] It is not established by the evidence that there was any monetary consideration for the release.

special steps should be taken to protect our interests. If so, whom we should address.

(b) On July 12, 1948, plaintiff's vice-president wrote to a representative of the United States then connected with the American Mission for Aid to Greece:

> For your information, we are having quite a time on our barbed wire at Basrah. We have never been able to sell it due to difficulties in getting it inspected by prospective customers, and now the people who are storing it there for us advise that they have had to report it to the Iraq Government because it is war material, and we are fearful that it may be commandeered. We have this matter up with the State Department as to just what action we should take. * * *

(c) On July 21, 1948, plaintiff's vice-president again wrote to defendant as follows (in part):

> * * * We are anxious to know if we will be restrained from shipping this property.
> * * * We would certainly like some sort of ruling from your department as to what our rights are and what steps we should take to protect them, if any, particularly whether we are definitely restricted from shipping this property.

(d) On July 26, 1948, defendant wrote plaintiff as follows (in part):

> * * * You have asked us to advise you whether any special steps should be taken to protect your interests.
> In the present state of events we have, of course, no basis for approaching the Iraqi Government in your behalf. Whenever your company desires to clear the shipment of your barbed wire with the Iraqi and difficulty of any sort arises, * * * [the] Commercial Attache, and the American Embassy at Baghdad will cordially, we are sure, render you every assistance possible. * * *

20. During July and August 1948, plaintiff negotiated for the sale of the wire to S. A. Boeresake Fed. Ko-op. The terms of sale were agreed upon subject to inspection by the purchaser, seller to guarantee shipment within 60 days after credit was established, and to post a five percent performance bond. Plaintiff guaranteed inspection transportation expenses up to $1,600 to be forfeited if the wire was not as specified and granted Boeresake an option until September

15, 1948, to inspect the wire. To be in a position to accept the foregoing terms plaintiff, by its agent in the early part of September 1948, applied to the proper authorities in Iraq for permission to export the wire. On September 12, 1948, the Commander of the Military Forces in the Third Martial Area, Iraq, refused to permit the export of the wire.

21. At a conference with representatives of defendant on September 23, 1948, plaintiff's vice-president requested defendant to have the American Embassy approach the Iraqi Government and attempt to have it release its restrictions upon the exportation of the wire. On October 1, 1948, the American Embassy in Baghdad was requested to do so. It replied under date of October 13, 1948, that it had determined not to approach the Ministry of Defense on this matter for the following reasons: (a) informal contacts with representatives of the Iraqi Government established that they felt that plaintiff should have exported between September 15, 1947, and May 25, 1948, when exportation was permissible; (b) intense anti-American feeling existed in the Iraq Army for what it considered to be American support of Iraq's enemies in Palestine; and (c) public and military opinion was further worked up by recent disclosures that barbed wire licensed for export to Italy had been re-exported to Israel.

22. By letter dated October 18, 1948, plaintiff further advised defendant of the difficulties encountered in selling the wire because of the restriction on export, and added:

> We are now negotiating on this material with a purchaser in South Africa and are unable to assure them that we can make delivery as in order to accept their offer we must guarantee shipment and post a performance bond, all of which we are unable to do on account of the foregoing restrictions. * * *
>
> Our purchase contract guaranteed by you our right to ship the material and if we are not to be permitted to do so we ask that you please advise what steps we should take to recover the purchase price and other incidental expenses we have been put to in connection with the transaction.

23. On October 20, 1948, the substance of the message from the American Embassy in Baghdad, described in finding 21, was given to plaintiff's vice-president with advice that de-

fendant was prepared to make another approach to the Iraqi Government upon being advised as to the name of the prospective purchaser and the country to which the wire was to be exported. Defendant's representative suggested that the chances of favorable consideration would be increased if plaintiff's purchaser would have his government give assurances to the Iraqi Government that the wire would not be reexported to Palestine.

24. (a) On October 21, 1948, plaintiff telegraphed defendant as follows (in part):

> Reference * * * your suggestion we furnish statement from customers guaranteed by their government that wire was for use in South Africa and would not be re-exported we feel that time element involved such proceedings would be interminable and that as your sales contract guaranteeing export was unqualified as to destination we are not obligated to obtain governmental guarantees from any country. * * * We are now definitely denied * * * right of export * * * by Iraqi military * * *. * * * This breaches our contract and therefore cancels contract and we request we be reimbursed for our purchase price plus moving and storage expenses * * *.

Plaintiff thereafter never adopted the suggestion contained in the last sentence of finding 23.

(b) On November 19, 1948, plaintiff again wrote defendant, reviewing the history of the transaction, and said:

> We ask that you take this letter as a formal claim * * * for a refund * * * of the entire purchase price * * * plus moving expenses, storage expenses since September 12, 1948 * * * together with all damages sustained * * * in connection with the resale * * *.
>
> Meanwhile, the undersigned is holding said barbed wire * * * for your account and risk, and will take such steps on your behalf as may be possible to mitigate damages * * *.

25. A claim for refund of the purchase price and other charges incurred in connection with the wire was filed by plaintiff with the Comptroller General of the United States, and was denied by him on June 22, 1949.

26. Pursuant to plaintiff's statements set forth in finding 24 above, counsel for plaintiff in June 1949, April 1950, and October 1950, notified defendant that plaintiff was engaged

in negotiations and would attempt to sell the wire to mitigate damages. Defendant informed plaintiff that it took the position that it had no interest in the wire but agreed that a sale by plaintiff would be without prejudice to the position taken by plaintiff in this litigation provided proper credit be given defendant in the event plaintiff recovered in this action. None of these negotiations developed into sales.

27. Plaintiff exercised diligence in seeking an export permit from Iraq, and on September 9, 1950, its agent obtained permit number 27152 from the Finance Minister, Iraq, which stated in part:

> It has been decided to permit Puran Singh and Partner's Transport and Contract Company, Basrah, to export 1,600 * * * tons of barbed wires which is a part of the twelve thousand tons which the Committee has already permitted to be exported vide its Decision Nos. 111 and 164 of 1947, provided that the export should be to outside Iraq excepting Palestine.
>
> This permission shall be considered to be in force for four months with effect from its above date.

28. Plaintiff exercised diligence in selling the wire and in obtaining the best price it could. Plaintiff sold the wire in January 1951, at approximately $121 per long ton to Khandelwal Bros. Ltd., Bombay, India, for $196,794.43 delivered in Bombay, which was a fair and reasonable price. Plaintiff incurred the following expenses which were fair, reasonable, and necessary in connection with the purchase, moving, storage, selling (including expenses aggregating more than $2,000 incurred in connection with unsuccessful attempt to consummate sales), obtaining permission to export, and delivering the wire:

Purchase price paid defendant	$194,022.00
Expense of moving, storage, selling, permission to export and delivering wire	[1] 126,467.45
	320,489.45
Plaintiff received from Khandelwal Bros. Ltd	196,794.43
Net claim of plaintiff	123,695.02

[1] This sum includes the amount specified in finding 11.

29. Defendant has not refunded plaintiff's purchase price, nor has it reimbursed plaintiff for the expenses incurred and paid by plaintiff in moving, storing, and selling the wire.

30. (a) When the contract was negotiated, both parties knew that some time probably would elapse before a permit to export the wire from Iraq would be used. Labor conditions and shipping facilities in Iraq were such that the wire probably could not have been removed in a matter of days; and if plaintiff allowed the wire to remain in Iraq until a resale of it had been consummated (as both parties knew plaintiff intended to do), the time that would elapse before export would extend from several weeks to several months.

(b) When the guarantee clause was inserted in Article 11 (that permission to export had been granted by Iraq), both parties expected that the Government of Iraq would abide by the commitment it had made with the United States. Neither of the parties intended or understood the defendant was undertaking a warranty against changes in conditions by reason of which Iraq might forbid export based on a change in national policy unrelated to the *bona fides* of its commitment to the United States.

(c) The actions of the Government of Iraq, in proclaiming martial law on May 14, 1948, in prohibiting the sale, transfer, or export of a variety of military items, including barbed wire, on May 25, 1948, and in refusing permission to plaintiff on September 12, 1948, to export the wire, were related to changes in conditions that had developed after July 1947 (when Iraq made its commitment with the United States relating to the export of surplus property) and after September 1947 (when the contract in suit was negotiated). None of the acts of Iraq hereinabove listed was an infringement upon its good faith in its commitment to the United States of July 1947.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is dismissed.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 297

HYMAN-MICHAELS COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. App. "B") is reported at 140 F. Supp. 784.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956.[1] The petition for a writ of certiorari

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[1] A timely motion by petitioner to set aside the judgment was denied on July 12, 1956.

was filed on August 1, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly concluded that a guarantee provision in a contract of sale between the United States and petitioner should be interpreted in accordance with its terms and that there was no satisfactory showing that the parties' mutual intention differed from the plain meaning of the language which they adopted.

STATEMENT

Petitioner brought suit against the United States in the Court of Claims for breach of contract to recover the difference between the sum for which it sold certain surplus barbed wire situated in Iraq and purchased from the United States, and the price which it had paid therefor. The pertinent findings of the court below may be summarized as follows:

On September 15, 1947, petitioner contracted to purchase an estimated 2,100 long tons of barbed wire from respondent at a price of $120 per ton. Three months prior to this sale, the United States had concluded an agreement with the Government of Iraq regarding the disposition of surplus property located in that country. The agreement provided that surplus items would be offered initially to the Government of Iraq. Finding 3.[2] If Iraq declined to buy and the United States sold to another purchaser, Iraq agreed

[2] The findings of the Court of Claims appear immediately following the court's opinion. Pet. App. "B", pp. 5-15.

that it would honor the bill of sale as an export permit (*ibid.*).

During the sale negotiations, petitioner's vice president was informed of Iraq's export controls. He was advised that the Government of Iraq had refused purchase of the wire and that accordingly, under the agreement reached between the two Governments, respondent could obtain issuance of an export permit. Findings 7(a), (b). Since petitioner intended to resell the wire to a foreign purchaser, exportability was of primary importance in the negotiations. Finding 7(a). In this connection, it appears that both parties were aware of tension and unrest in the Middle East and of the possibility that armed conflict might result from implementation of the recently promulgated United Nations' report containing recommendations for the partition of Palestine. Finding No. 4.

The contract contained the following provision (Article 11):

> The Seller guarantees that permission to export the property * * * has been granted by the Iraqi Government.

Upon ratification of the contract, petitioner promptly initiated negotiations for resale of the surplus wire to a South American purchaser. Finding 12. The negotiations broke down, however, when petitioner became dissatisfied with the prospective buyer's credit arrangements and refused to complete the transaction (*ibid.*). On May 14, 1948, eight months after the original sale, the Government of Iraq declared martial law and, on May 25, 1948, Iraq authorities prohibited

the export of a variety of military items, including barbed wire, except with the authorization of the Ministry of Defense. Findings 14, 16. On September 12, 1948, petitioner's request for permission to export the wire was denied. Finding 20. Thereafter, at petitioner's request, respondent agreed to approach the Iraqi Government, upon being advised of the name of the new prospective purchaser and of the country to which the wire would be exported. Finding 23. Respondent's representative further suggested that the prospects of success would be increased if the prospective purchaser would have his government assure the Iraqi Government that the wire would not be reexported to Israel (*ibid.*). On October 21, 1948, petitioner replied that negotiations to obtain such a guarantee from the government of the purchaser would involve protracted proceedings, and that it felt that the contract had been breached. Finding 24(a).

The Court of Claims concluded that the United States had not undertaken a warranty against changes in international conditions which might induce Iraq to forbid exportation. It therefore denied recovery.

ARGUMENT

This case involves a narrow issue of contract interpretation. The unambiguous language of the provision involved (Article 11) not only supports, but patently requires, the Court of Claims' construction. The court below nonetheless permitted a full hearing on the question whether the parties' mutual intention was different from that expressed in the contract. It concluded that it was not. See Finding 30(b); opin-

ion, Pet. App. "B", pp. 3-4. There is no occasion for review of this factual determination.

Petitioner's case necessarily rests on the proposition, without support in the contract, that the language of the guarantee ("the Seller guarantees that permission to export the property * * * has been granted by the Iraqi Government") went beyond a representation as to an existing fact. Petitioner asks, in substance, that the courts treat the words, "has been granted," as if the parties had written, "has been granted and will not be withdrawn or rescinded."

It is unlikely, on the face of it, that a representative of the United States would agree to an arrangement whereby a purchaser of surplus property would be entitled to hold it indefinitely (perhaps speculating on a rising market) and rescind his agreement to purchase if it developed at any future time that the acts of a foreign government created an obstacle to resale. To hold a contractor to so burdensome an agreement one would expect, at the least, words which unequivocally import such an undertaking. Here the words negate it.

The Court of Claims' interpretation does not deprive Article 11 of meaning. The United States, by that provision, represented that Iraq had, in fact, declined to exercise its prior right of purchase, and that the way was accordingly clear, under the terms of the inter-governmental agreement, for petitioner to make the purchase and to dispose of the property. There is no reason whatever to suppose that petitioner's vice-president, an experienced negotiator (Finding 7(a)), believed that there had been any broader commitment.

More than eight months passed between the sale by the United States to petitioner and Iraq's declaration of martial law. Almost a year passed before petitioner actually requested an export permit. Petitioner took the risk that Iraq, as a sovereign nation, might, one day, decide to prevent exportation of war materiel, such as barbed wire. The United States never undertook to insure against such a contingency—a matter over which it had no control.

Petitioner argues that there is no specific finding to support the statement in the court's opinion that there was no satisfactory evidence "that the language [of the contract] meant anything substantially different from what it said" (Pet. App. "B", pp. 3-4). This contention is frivolous. The court specifically found (Finding 30(b)):

> When the guarantee clause was inserted in Article 11 (that permission to export had been granted by Iraq), both parties expected that the Government of Iraq would abide by the commitment it had made with the United States. Neither of the parties intended or understood the defendant was undertaking a warranty against changes in conditions by reason of which Iraq might forbid export based on a change in national policy unrelated to the *bona fides* of its commitment to the United States.

CONCLUSION

The decision below is clearly correct and the case presents no issue warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1956

☆ U. S. GOVERNMENT PRINTING OFFICE 1956—396832/P.O. 212